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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. DAMIEN AUGUSTA COLLINS, Appellant.	2 CA-CR 2007-0045 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200600028

Honorable James L. Conlogue, Judge

AFFIRMED IN PART; MODIFIED IN PART AND REMANDED

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E S P I N O S A, Judge.

¶1 Following a jury trial, appellant Damien Collins was convicted of first-degree burglary of a nonresidential structure, first-degree burglary of a residential structure, armed robbery, kidnapping, theft of a means of transportation, aggravated assault, and

endangerment. The trial court sentenced him to presumptive, consecutive prison terms totaling 46.25 years.

¶2 Collins argues the trial court abused its discretion in denying his motion to preclude the victim's in-court identification of him, erred in instructing the jury on the meaning of reasonable doubt, and erred in sentencing him to consecutive terms of imprisonment. For the following reasons, we affirm Collins's convictions but remand the case to the trial court for resentencing on the nonresidential burglary conviction.

Background

¶3 Viewed in the light most favorable to sustaining the convictions, *see State v. Fernandez*, 216 Ariz. 545, n.3, 169 P.3d 641, 643 n.3 (App. 2007), the evidence presented at trial established the following. At about four in the morning on December 17, 2005, Peter B. had already been working for several hours at the bakery he and his wife owned. When he went outside to get the newspaper, Collins pointed a gun at his face and threatened to kill Peter if he spoke or looked at him. Collins then ordered Peter to turn around, grabbed his shirt collar, put the gun to his neck, and told him, "We are going back in the f___ing bakery. I need some f___ing money," as he marched Peter back into the bakery. Collins then removed all the cash from the bakery's cash register and, again holding the gun to him, demanded Peter's wallet, told him to get his car keys, and ordered him to drive, with Collins as his passenger. Collins first demanded that Peter drive into a bank parking lot and withdraw money from the automated teller machine. After Peter insisted he did not know his personal identification number and explained that, because the bakery was a cash

business, he asked his wife for money when he needed it, Collins told Peter to drive to his home.

¶4 With Collins holding the gun at Peter's neck, the two men entered the house, where Peter's wife and daughter were sleeping, and Collins again demanded money, taking money bags containing the bakery's cash receipts. Still holding Peter at gunpoint, Collins ordered him to get back in his vehicle and drive, directing him along a route that led to the Mexican border. Just before they reached the border, Peter stepped hard on the brakes, opened the driver's side door, and rolled out of the vehicle. He then ran toward Homeland Security Officers, shouting, "I'm kidnapped," as Collins drove Peter's vehicle across the border. Collins was later apprehended in Mexico—in the same town where Peter's vehicle was recovered—and returned to Arizona.

Victim's In-court Identification

¶5 Collins contends the trial court abused its discretion in permitting Peter to identify him in court because, according to Collins, Peter's pretrial identification of him was not reliable. He argues Peter lacked sufficient opportunity to observe his assailant to make a positive identification. He also maintains Peter's pretrial identification of him was less than certain, noting that Peter had commented during the photographic lineup that he remembered his assailant as having darker skin than Collins appeared to have in the lineup photograph.

¶6 After Collins moved to suppress the identification, the trial court conducted a *Dessureault*[1] hearing and found, "the State has proven by clear and convincing evidence that the pretrial identification procedures were not unduly suggestive, in fact they were not suggestive at all." Consequently, the court ruled that the state could elicit an in-court identification from Peter at trial.

¶7 Collins does not argue that Peter's in-court identification had been tainted by any suggestive conduct by the state at the two pre-trial photographic lineups Peter had viewed. *See State v. Lehr*, 201 Ariz. 509, ¶ 52, 38 P.3d 1172, 1184 (2002) ("An in-court identification may be tainted by suggestive lineup procedures."). Instead, he maintains Peter's in-court identification was unreliable based on the factors set forth in *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972), and that the court therefore abused its discretion in allowing Peter to identify Collins at trial.

¶8 In *Biggers*, the Supreme Court identified factors relevant to whether a witness's pre-trial identification of a defendant was reliable—and therefore admissible—"even though the confrontation procedure was suggestive."[2] *Id.* at 199; *see*

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[1]*State v. Dessureault*, 104 Ariz. 380, 384, 453 P.2d 951, 955 (1969).

[2]Those factors include:

> the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Biggers, 409 U.S. at 199-200.

also Manson v. Brathwaite, 432 U.S. 98, 114 (1977) (*Biggers* reliability factors "to be weighed [against] the corrupting effect of the suggestive identification itself" to determine admissibility). And our supreme court has stated that if a "photographic lineup was not unduly suggestive, the issue [of] whether out-of-court identifications tainted in-court identifications becomes moot." *State v. Phillips*, 202 Ariz. 427, ¶ 22, 46 P.3d 1048, 1055 (2002); *see also Simmons v. United States*, 390 U.S. 377, 384 (1968) ("[C]onvictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."); *cf. State v. Nordstrom*, 200 Ariz. 229, ¶ 25, 25 P.3d 717, 729 (2001) ("Only identification evidence allegedly tainted by state action must meet the reliability standard articulated in *Biggers*.").

¶9 Accordingly, we agree with the state that Collins has waived his challenge to the admission of Peter's in-court identification by failing to challenge the trial court's ruling that the photographic lineup procedures were not unduly suggestive. *See State v. Sanchez*, 200 Ariz. 163, ¶ 8, 24 P.3d 610, 613 (App. 2001) (failure to develop argument on appeal results in waiver). Moreover, based on our review of the *Dessureault* hearing, we find no error in the court's ruling on this issue or its decision to permit the in-court identification.

Portillo **Instruction**

¶10 Collins next argues the trial court erred in instructing the jury on the meaning of reasonable doubt in accordance with *State v. Portillo*, 182 Ariz. 592, 898 P.2d 970 (1995). Our supreme court has repeatedly reaffirmed the constitutionality of the *Portillo* instruction, most recently in *State v. Martinez*, 218 Ariz. 421, ¶ 81,189 P.3d 348, 364 (2008), *cert. denied*, No. 08-5971, 2008WL3977295 (U.S. Nov. 3, 2008). In *State v. Lamar*, 205 Ariz. 431, ¶ 48, 72 P.3d 831, 840 (2003), the court rejected the argument that the instruction improperly shifts the burden of proof by suggesting jurors consider whether there is "a 'real possibility' the defendant is not guilty," *id*., the same argument Collins raises on appeal. We are bound by the decisions of our supreme court and therefore do not address this argument. *See, e.g.*, *State v. Sullivan*, 205 Ariz. 285, ¶ 15, 69 P.3d 1006, 1009 (App. 2003).

A.R.S. § 13-116

¶11 Collins argues the trial court erred in imposing consecutive sentences for the armed robbery, burglary, aggravated assault, kidnapping, and endangerment offenses. Collins did not raise this issue below and has therefore forfeited our review absent fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005). But a court's imposition of a consecutive sentence that is unauthorized under A.R.S. § 13-116 is fundamental error, *State v. White*, 160 Ariz. 377, 379, 773 P.2d 482, 484 (App. 1989), and patently prejudicial. *Cf. State v. Joyner*, 215 Ariz. 134, ¶ 32, 158 P.3d 263, 273 (App. 2007) (but for sentencing error, sentence would have been suspended). Accordingly, we will review de novo the trial court's decision to impose

consecutive sentences. *See State v. Urquidez*, 213 Ariz. 50, ¶ 6, 138 P.3d 1177, 1179 (App. 2006).

¶12 Section 13-116 precludes consecutive sentences for "[a]n act or omission . . . made punishable in different ways by different sections of the laws." This poses an "analytic difficulty" because a crime is not the equivalent of a single act but, instead, "a series of interrelated events and movements—a total transaction with indefinite spatial and temporal boundaries." *State v. Gordon*, 161 Ariz. 308, 313, 778 P.2d 1204, 1209 (1989). Thus, to give effect to § 13-116, a court must "determine whether a constellation of facts constitutes a single act, which requires concurrent sentences, or multiple acts, which permit consecutive sentences." *Id.* at 312, 778 P.2d at 1208.

¶13 The court in *Gordon* established an analytical framework to resolve this difficulty. Specifically,

> [f]irst, we must decide which of the . . . crimes is the "ultimate charge—the one that is at the essence of the factual nexus and that will often be the most serious of the charges." Then, we "subtract[] from the factual transaction the evidence necessary to convict on the ultimate charge." If the remaining evidence satisfies the elements of the secondary crime, the crimes may constitute multiple acts and consecutive sentences would be permissible. We also consider whether "it was factually impossible to commit the ultimate crime without also committing the secondary crime." Finally, we consider whether the defendant's conduct in committing the lesser crime "caused the victim to suffer a risk of harm different from or additional to that inherent in the ultimate crime."

Urquidez, 213 Ariz. 50, ¶ 7, 138 P.3d at 1179 (citations omitted), *quoting Gordon*, 161 Ariz. at 315, 778 P.2d at 1211 (alteration in *Urquidez*). In contrast to double jeopardy

analysis, which requires consideration of whether two offenses, as defined by statute, are comprised of the same elements, "our analysis under § 13-116 focuses on the 'facts of the transaction' to determine if the defendant committed a single act." *State v. Siddle*, 202 Ariz. 512, ¶ 17, 47 P.3d 1150, 1155 (App. 2002), *quoting Gordon*, 161 Ariz. at 313 n.5, 778 P.2d at 1209 n.5.

¶14 Collins and the state appear to agree that armed robbery is the ultimate offense in this case for the purpose of the test set forth in *Gordon*. As Collins points out, although his offenses share some factual nexus, his primary objective appears to have been forcefully taking Peter's property from him. Although Collins characterizes the armed robbery as a single, continuing "criminal episode," the state maintains that "[e]ach felonious act was committed independently of the other and was completed before the beginning of the next act." We conclude that neither party's analysis is completely correct.

¶15 In applying the first step of the *Gordon* analysis, we "subtract[] from the factual transaction the *evidence necessary to convict* on the ultimate charge," rather than all evidence that might be relevant to the elements of the charge. *Gordon*, 161 Ariz. at 315, 778 P.2d at 1211 (emphasis added). The facts necessary to establish the armed robbery are that Collins, while armed with a gun, threatened Peter to prevent him from resisting as Collins took money from the bakery's cash register. *See* A.R.S. §§ 13-1902, 13-1904. The armed robbery thus began when Collins accosted Peter outside and was completed when Collins took the money in the bakery. After subtracting those facts, evidence remains that Collins intended to steal additional money from Peter; that he ordered Peter, at gunpoint,

to drive to his home and to permit Collins's entry there; that, once inside the house, Collins took money bags containing cash; and that Collins then kept Peter at gunpoint while again directing him to drive, intending to take Collins and his vehicle across the border into Mexico.

Residential Burglary, Kidnapping, Aggravated Assault, and Endangerment

¶16 These remaining facts were sufficient to establish elements of first-degree, residential burglary, which requires proof that a defendant entered a residential structure unlawfully and committed a felony therein while knowingly possessing a deadly weapon. A.R.S. §§ 13-1507, 13-1508(A). They were also sufficient to establish kidnapping because Collins knowingly restrained Peter when he forced him to drive to his home, where Collins intended to commit the residential burglary. *See* A.R.S. § 13-1304. The elements of aggravated assault were established because Collins used his gun to intentionally place Peter in reasonable apprehension of imminent physical injury after the two men left the bakery. *See* A.R.S. §§ 13-1203, 13-1204. And in addition to placing Peter in reasonable apprehension of injury, Collins actually endangered Peter, placing him in "substantial risk of imminent death or physical injury" by recklessly keeping a gun pressed to Peter's neck or side while Peter was operating a motor vehicle. *See* A.R.S. § 13-1201. Thus, the first factor of the *Gordon* analysis supports the conclusion that these crimes were separate from the armed robbery and that consecutive sentences were therefore permissible. *See Gordon*, 161 Ariz. at 315, 778 P.2d at 1211.

¶17 Applying the second *Gordon* factor, we conclude Collins could have committed the armed robbery at the bakery without committing the kidnapping, residential burglary, aggravated assault, or endangerment that followed. Because both the first and second factors in the *Gordon* analysis support the conclusion that these crimes were separate from the armed robbery offense, no further inquiry appears to be required. *See id*. (if "factually impossible to commit the ultimate crime without also committing the secondary crime," court then considers issue of additional harm from secondary crime); *see also State v. Boldrey*, 176 Ariz. 378, 382-83, 861 P.2d 663, 667-68 (App. 1993) (noting implication in *Gordon* that third factor may not be required). In any event, we have no difficulty concluding that the offenses committed after the armed robbery at the bakery exposed Peter "to a different or additional risk of harm." *Gordon*, 161 Ariz. at 314, 778 P.2d at 1210. We thus find no error in the trial court's order that sentences for these convictions be served consecutively to Collins's sentence for armed robbery.

Nonresidential Burglary

¶18 We reach a different conclusion, however, with respect to the sentence for first-degree, nonresidential burglary. Subtracting the facts necessary to convict Collins of the armed robbery charge, including the fact that Collins was armed with a gun when he took money from the bakery's cash register, the facts remaining establish that Collins knowingly (1) entered or remained unlawfully in the bakery (2) with the intent to commit a theft or other felony, which satisfies two of the elements required for Collins's conviction on the first-degree burglary charge. *See* A.R.S. §§ 13-1506, 13-1508(A). Under the facts

of this case, however, evidence does not remain to establish the third element necessary to prove first-degree burglary—that Collins knowingly possessed a deadly weapon or dangerous instrument in the course of committing a felony. *See* § 13-1508(A).

¶19 Once we subtract evidence that Collins was armed with a gun when he took the money from the cash register, a fact necessary to the armed robbery conviction, no evidence remains to prove he knowingly possessed a deadly weapon or dangerous instrument when committing that felony while in the bakery. As a result, the first factor of the *Gordon* analysis supports the conclusion that, when Collins committed the armed robbery and the nonresidential burglary of the bakery, he committed a single criminal act for purposes of § 13-116.

¶20 Under the second factor of the *Gordon* test, we consider whether, "given the entire 'transaction,' it was factually impossible to commit" the armed robbery without also committing the nonresidential burglary. *Gordon*, 161 Ariz. at 315, 778 P.2d at 1211. Relying on *State v. Runningeagle*, 176 Ariz. 59, 66-67, 859 P.2d 169, 176-77 (1993), the state argues that "burglary presents [a] separate, punishable harm from an attack that occurs in the home." In *State v. Williams*, Division One of this court attempted to reconcile our supreme court's analysis in *Runningeagle* with the test set forth in *Gordon*, noting that, in *Runningeagle*, the court had not "restrict[ed] its comparison of the burglary to the ultimate crime of murder as the literal application of *Gordon* seems to require" when it determined that Runningeagle could have murdered his victims within their home without first committing burglary. *State v. Williams*, 182 Ariz. 548, 561, 898 P.2d 497, 510 (App.

1995). *Williams* suggests the court in *Runningeagle* had reasoned that "since one object of the entering or remaining in the house was the theft, and the burglary was charged as entering and remaining in the house with the intent to commit the *theft*, the defendant could have committed the murder without committing the burglary (i.e., theft), so a consecutive sentence was permissible." *Id*., *citing Runningeagle*, 176 Ariz. at 67, 859 P.2d at 177.

¶21 In this case, however, the facts do not support a similar finding under either the first or second factor of the *Gordon* test because Collins, unlike Runningeagle, entered premises unlawfully for the sole purpose of committing an armed robbery and, as discussed above, the armed robbery and first-degree burglary charges each relied on evidence that Collins was armed to prove required elements of those offenses. *See* ¶¶ 18-19, *supra*. Collins told Peter he wanted the money from the bakery when he first accosted him outside but did not take any property from Collins until after he had entered the bakery unlawfully. Thus, Collins could not have completed the armed robbery, as it occurred in this case, without also committing the burglary. *See State v. Alexander*, 175 Ariz. 535, 538, 858 P.2d 680, 683 (App. 1993) (victim robbed in house after unlawful entry; robbery could not have been committed without also committing burglary). Based on this factor, "the likelihood [is] increase[d]" that Collins committed a single act under § 13-116. *Gordon*, 161 Ariz. at 315, 778 P.2d at 1211.

¶22 Turning to the final factor of the *Gordon* test, we consider whether Collins's conduct in committing the first-degree burglary of a nonresidential structure caused Peter "to suffer a risk of harm different from or additional to that inherent" in the armed robbery,

as that crime was committed in this case. *See id*. We conclude there was no such additional or different risk of harm as a result of the burglary of the bakery.

¶23 In summary, the same evidence was required to prove the armed robbery and first-degree, nonresidential burglary charges, with insufficient additional evidence to prove both crimes; under the facts, Collins could not have committed the armed robbery without committing the burglary; and Collins's conduct in the commission of the burglary did not increase or alter the risk of harm to Peter. Under these circumstances, we conclude Collins's convictions for the armed robbery and nonresidential burglary were convictions for a single act for purposes of § 13-116. Imposing a consecutive sentence for the nonresidential burglary was therefore prohibited. *See Gordon*, 161 Ariz. at 315, 778 P.2d at 1211.

Conclusion

¶24 For the foregoing reasons, we affirm Collins's convictions but vacate the sentence for his nonresidential burglary conviction and remand the case for resentencing consistent with this decision.

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PHILIP G. ESPINOSA, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge